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SIXTH REPORT ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

by

Mr. Julio BARBOZA, Special Rapporteur

Addendum

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VII. LIABILITY FOR HARM TO THE ENVIRONMENT IN AREAS BEYOND NATIONAL JURISDICTIONS (GLOBAL COMMONS)

A. Preliminary considerations

71. Last year, the Special Rapporteur promised to explore the possibility of extending the topic of liability for acts not prohibited by international law to harm caused to the so-called "global commons", a term which could perhaps be rendered in legal Spanish as "espacios públicos internacionales", by analogy with areas in common use which, under domestic law, are in the "public domain" ("dominio público") of the State - a public square, for instance. 72/ It is necessary to clarify what is meant by "extending the topic" to cover harm to the "global commons", for it is not a question of drafting an entire body of environmental law through the legal precept of liability, but rather of applying the concept of liability in all the areas in which it must be applied. With regard to our draft, there are three main issues which we must consider in order to determine whether the concept can be extended to the "global commons", namely: (a) the concept of harm; (b) the concept of affected State; and (c) the applicability of responsibility for wrongfulness or "causal" liability.

72. In our view, there is a preliminary question which is crucial to our investigation, namely, whether under existing general international law, any State or individual can cause harm to the "global commons", or to areas beyond national jurisdictions, without such harm having some kind of consequences for the State or individual that causes it. If the answer to this question is yes, we would have to ask ourselves a second question: is it conceivable that such a situation should be allowed to continue, given the conditions in which the international community is now living? We should remember that the progressive development of international law is one of the tasks assigned to the International Law Commission.

B. Harm

73. In order to answer these questions, the first distinction to bear in mind is whether the harm affects persons or property in areas beyond national jurisdictions (or causes injury to States within the meaning of article 2 (g) and (h) of our draft), or whether it causes injury solely and exclusively to the environment. A study prepared at the request of the Special Rapporteur 73/ finds no conceptual

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72/ Whether the "global commons" were considered as a res communis to all States, or as belonging to the eminent domain of the international community as a whole, i.e., as distinct from the sum of its members - in which case we would have to give it legal personality - there apparently would be no major differences in practice. In both cases, States would have common use, which has been recognized in practice up to now.

73/ "The doctrine of liability and harm to the 'global commons'" (unpublished).

difficulty with the first kind of harm and takes the view that (provisional) article 1 of our draft covers it. We agree that the first hypothesis should present neither theoretical nor even practical difficulties with regard to the affected State, because there will be an affected State wherever its nationals, its property or the property of its nationals are injured. With regard to the State of origin, there will be occasions when it will be easily identifiable (for example, in the event of an accident) and others when this may not be so easy. In any case, that would be a matter of proof and would not alter the principle itself.

74. The second hypothesis, namely, harm caused solely to the environment of the "global commons", presents very real difficulties. In principle, these difficulties would be as follows: (a) harm to the environment per se is a new element; (b) the threshold of harm to the "global commons" cannot easily be measured, in terms of its impact on persons or property, with sufficient precision to enable a liability régime to be established; and (c) it cannot be established with certainty that identifiable harm to the "global commons" would result in identifiable harm to human beings: all that can be established would be an overall correlation between the quality of the environment and the well-being and quality of life of human beings in those areas. 74/ Whatever the difficulties may be, however, the first and fundamental question in our earlier paragraph remains to be answered: are there legal consequences arising out of harm caused to the environment per se in areas beyond national jurisdictions? There are, of course, almost no precedents of liability for such harm, except perhaps the recent Convention on the Regulation of Antarctic Mineral Resource Activities. Not even such well-worn principles as that of sic utere tuo are applicable to harm to the environment which does not have an appreciable (significant) effect on States or their property, or on the nationals of States or their property. 75/ Of course, this is because the problem is a recent one: until a short time ago, the effects of activities causing environmental pollution beyond national jurisdictions were dispersed over a seemingly infinite area, whose saturation and consequent degradation were not within the foreseeable future. How was anyone to think in terms of liability for the human activities that caused such harmful effects? One preliminary answer to the first of the two questions we raised at the outset is that general international law does not, up to now, appear to have assigned any legal consequences to harm caused to the environment unless, as we saw, such harm affects States or their nationals.

75. It so happens, however, that we have now reached the point where cumulative effects, on the one hand, and major accidents, on the other, are causing harm to the environment which is having an appreciable (significant) impact on States, their nationals and their property. In this situation, there should be no doubt as

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74/ Ibid., pp. 16-17.

75/ The cases on which our reasoning with regard to transboundary harm has been based, for instance, the Corfu Channel and Trail Smelter cases, refer to harm caused directly or indirectly to specific States, not to property having the characteristics of "global commons".

to the consequent liability, or the need to establish such liability for the future whenever that is materially possible, since we would in fact be dealing with the case referred to in the preceding paragraph, namely, harm to the environment which has an impact on persons or property. Our question, however, refers to harm which does not as yet have consequences for human beings. Before we get to the stage described in the previous paragraph, we have harm which, although it may be significant for the environment, is not yet significant for human beings. In order for harm to the "global commons" to reach the point of affecting States either directly or through their nationals or the latter's property, the cumulative harmful effects must generally, as we noted above, be tremendous. The areas involved are very vast, they are normally uninhabited or sparsely populated, and there is relatively little private or State property there. Moreover, the effects usually are not concentrated in one place: they are dispersed by water or air currents and disappear into the vastness of the seas or the atmosphere. The harm is intangible for now but potentially threatening, and no longer just for the environment but also for mankind itself. Let us take, for example, the emission of certain gases produced as a result of human activities which enter the atmosphere and are said to cause the famous "greenhouse effect". It is difficult to know for sure whether the harm so far caused to the atmosphere is significant for man, since the global warming of the Earth observed in recent years could be due to another cause of climatic variation and be simply temporary, or perhaps since the harm so far caused by this global warming, if it has caused any, cannot be measured. There are, however, strong and justified suspicions: if they are confirmed, the harm may prove immense and irreversible for the Earth's inhabitants. This is a different kind of harm from that generally dealt with in law: a potential harm, invisible for now, but seen as a definite threat. 76/ Somewhat similar situations are not, however, unknown in domestic law, where cumulative instances of minor harm, taken individually, seem insignificant but assume catastrophic proportions when viewed all together. Closed seasons for hunting, or quotas to protect certain species from extinction would be cases in point. 77/ The interesting thing is that, in domestic law, such prohibitions are primarily penal or correctional in intent; the penalty is not necessarily proportional to the harm caused, and any compensation is of a purely incidental nature.

C. Harm and liability

76. The presumable, or foreseeable, inevitability of harm to mankind now makes it necessary, as we said above, to think about regulating those activities in some way before the threat they pose to the environment materializes and the resulting environmental degradation translates into appreciable or significant harm to

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76/ It is also different from the potential harm that could be caused by an activity involving risk: there, the harm is contingent because it may or may not occur, while here, harm will inevitably occur if the activities continue to go unregulated.

77/ This also happens in some international conventions which attempt to protect common resources, such as certain animal species, for example.

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people. The legal rules governing such activities will, of necessity, have to impose on States which cause harm either the obligation to provide some kind of safeguard or compensation to cover such damage, or some other obligation the breach of which would have certain consequences. 78/ In other words, States will have to be held liable or responsible in some way. There is no need to elaborate further on this point, because the truth of this statement appears to be self-evident and it is inconceivable that irresponsible, systematic assaults on the environment of the "global commons" should be allowed to continue. The answer to the second question, therefore, would be that if there is no current liability whatsoever under international law for harm of the kind we are considering to the environment in areas beyond national jurisdictions, then there definitely ought to be. That being the case, what liability régime would be most appropriate? We shall take up this important issue later on. The study we are commenting on suggests that the trend in international practice is towards applying responsibility for wrongfulness to activities with harmful effects, i.e., activities which cause harm through their normal operation, and "causal" liability to activities involving risk which cause harm through accidents. 79/ In both cases, however, we face certain problems in using existing legal concepts to determine which of these forms of responsibility or liability applies to the "global commons".

78/ To keep to the two kinds of liability we are familiar with: causal liability and responsibility for wrongfulness.

79/ The last point of the aforementioned study raises the question as to what legal régime could be applied to harm to the "global commons" and says that:

> "There seemed to be a trend in identifying specific activities or items that cause harm to the global commons and making them subject to a legal régime restricting their conduct or banning their use. With all the deficiencies in the existing legal régime, a considerable number of regulatory measures and legal instruments imposing obligations on States not to harm the global commons continue to develop. ... In terms of policy, when dealing with an activity which <u>continuously</u> and <u>repeatedly</u> causes harm to the global commons, it is preferable either to modify it or to ban it altogether. The trend indicates support for this policy and there seems to be a preference and consensus in the international community to <u>abate</u> activities that have proven to cause a <u>continuous</u> and <u>repeated significant</u> harm to the global environment. The trend does not support a policy for allowing the activity to continue and paying compensation for the harm caused. ... This trend indicates a preference for dealing with those activities causing harm to the global commons on a continuous and repeated basis within the framework of State responsibility for wrongful acts." (see note 73 above, p. 48)

This would apply, then, to the activities we refer to as "activities with harmful effects". As for activities involving risk, the study in question goes on to say:

77. One problem has to do with the fact, mentioned earlier, that it is impossible to establish with certainty whether identifiable harm to the environment beyond national jurisdictions ultimately causes identifiable harm to human beings. As a result, if it is virtually impossible to measure harm to persons or property, it is equally difficult to assess the compensation or payment owed by the State of origin for having caused the harm, if indeed it is possible to identify the State of origin (consider the degradation caused by chlorofluorocarbons, carbon dioxide or methane, for example, which are emitted in vast amounts by millions of factories, electric power plants, private homes, cars, etc.). If the harm cannot be assessed, if there is no identifiable affected State and if responsibility must nevertheless be assigned to the extent that the source of the harm can be traced, as we noted when we answered the first question, it would seem that further thought must be given to certain basic legal concepts of responsibility and liability.

D. Harm and responsibility for wrongfulness

78. We know that part 1 of the draft articles on State responsibility stipulates that responsibility derives from the breach of an international obligation and not from harm done; in any case, the harm need be nothing more than the simple violation of a subjective right by a party bound by that obligation. 80/ The problem is solved by environmental protection conventions, by general prohibitions against harming the environment - which, for the reasons given earlier, are very

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(continued)

"Leaving aside the main corpus of the régime dealing with activities that cause harm to the global environment within the framework of State responsibility, there is a narrower and more limited aspect of that subject which might be appropriate to be dealt with in the context of international liability. That is accidental harm to the global environment. Such accidents, for example, include the breaking down of an oil tanker or a tanker carrying other types of wastes on the high seas, etc." (ibid., p. 49).

80/ "Most of the members of the Commission agreed with the Special Rapporteur regarding the preceding considerations; in particular, they recognized that the economic element of damage referred to by certain writers was not inherent in the definition of an internationally wrongful act as a source of responsibility, but might be part of the rule which lays upon States the obligation not to cause certain injuries to aliens. Furthermore, with regard to the determination of the conditions essential for the existence of an internationally wrongful act, the Commission also recognized that under international law an injury, material or moral, is necessarily inherent in every violation of an international subjective right of a State. Hence the notion of failure to fulfil an international legal obligation to another State seemed to the Commission fully sufficient to cover this aspect, without the addition of anything further". Roberto Ago, Scritti sulla responsabilità internazionale degli Stati, II, 1, p. 411, quoting from his third report (see also Yearbook ... 1971, vol. II (Part One), document A/CN.4/246).

difficult to enforce - or by banning the emission of certain elements or their emission above certain levels. 81/ In any event, this is one way of regulating certain activities in order to protect the atmosphere, climate or marine environment that we wholeheartedly support. But given the difficulties which exist in measuring harm and the consequent compensation, what should responsibility for wrongfulness mean? According to the solution adopted in part 1 of the draft articles on State responsibility for wrongful acts, 82/ a wrongful act brings into play two legal relationships: either the subjective right of an injured State to demand reparation (in the full sense of the term) from the author of the act, or the ability of that same State to impose a penalty on the author of the wrongful act. 83/ Given what we have seen regarding the impossibility of making reparation for certain kinds of harm to the environment, in such cases the only option is to impose penalties. On the other hand, when the harm can be identified and somehow quantified, reparation is possible and can take various forms, one of the most practical being restoration of the status quo ante as we saw in the same report. 84/

E. The affected State

79. By definition, there would be no State that was directly injured through its territory, property, nationals or the property of its nationals. However, if the convention which may be concluded on this subject expressly stipulated as much, harm to the environment would affect a collective interest as defined in a multilateral treaty, under the terms of article 5 (2) (f) of part 2 of the draft articles on State responsibility for internationally wrongful acts:

81/ See the aforementioned study, p. 17, referring to a number of conventions including the International Convention for the Prevention of Pollution of the Sea by Oil; the Agreement concerning the International Commission for the Protection of the Rhine against Pollution; the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water; the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil; the Convention on the Prevention of Marine Pollution by Dumping from Ships and Aircraft; the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter; the International Convention for the Prevention of Pollution from Ships; the Nordic Environmental Protection Convention; the Convention on the Protection of the Marine Environment of the Baltic Sea Area; the Convention for the Protection of the Mediterranean Sea against Pollution; the Convention on Long-range Transboundary Air Pollution; the Vienna Convention for the Protection of the Ozone Layer; and the 1982 United Nations Convention on the Law of the Sea.

82/ Third report of Mr. Roberto Ago, reproduced in op. cit., pp. 365-380 (see also Yearbook ... 1971, vol. II (Part One), document A/CN.4/246).

83/ Ibid., p. 372.

84/ See ibid., art. 24 (a), and commentary, para. 50.

"In particular, 'injured State' means:

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto." 85/

In this regard, the commentary states: "Paragraph 2 (f) deals with still another situation. Even if, as a matter of fact, subparagraph (e) (ii)" - which represents an attempt to place the injured State in the context of a multilateral treaty or a breach of a rule of customary law - "may not apply, the States parties to a multilateral treaty may agree to consider a breach of an obligation, imposed by such treaty, as infringing a collective interest of all the States parties to that multilateral treaty. Actually, and by way of example, the concept of a 'common heritage of mankind', as recently accepted in respect of the mineral resources of the sea-bed and subsoil beyond national jurisdiction, expresses such a collective interest." (emphasis added) 86/

"Obviously, in the present stage of development of the international community of States as a whole, the recognition or establishment of a collective interest of States is still limited in application. Accordingly, subparagraph (f) is limited to multilateral treaties, and to express stipulations in those treaties." 87/

F. Applicable liability

80. As we said above, harm to the environment of the "global commons" often cannot be measured or assessed, in which case the consequence of the breach of an obligation is primarily punitive. This is true both in cases where maximum permitted levels for the introduction of certain substances into the environment are exceeded and in cases where general prohibitions are violated, maximum levels and general prohibitions being the two techniques so far used to protect the environment. 88/ This explains the difficulties encountered in some conventions in

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85/ Yearbook ... 1985, vol. II (Part Two), p. 25.

86/ Ibid., p. 27, para. 23.

87/ Ibid., para. 24.

88/ See footnote 73 above, p. 17; in mentioning a number of conventions which attempt to prevent certain types of harm to the global environment, it states: "These Conventions either specify the types of pollutants that should not be introduced into the global commons or provide general prohibitions for harming the environment by any type of pollutants".

finalizing a chapter on liability, an issue which in all instances has remained unresolved: 89/ States normally refuse to accept liability for their conduct and the same difficulties can be expected to arise in the future.

81. In earlier debates we saw that it may be more practical to apply causal or strict liability than responsibility for wrongfulness to regulate a given activity because, ironically, causal liability is less stringent and does not qualify the conduct which gives rise to the liability. We also know that, while they are based on the logic of strict liability, our draft articles do not in fact apply it strictly because once the causal link between the act in the State of origin and the harm in the affected State has been established, the State of origin is simply under an obligation to negotiate with the affected State compensation for the harm. There are also certain grounds for exoneration from liability (article 26). Would it be possible to subject to the régime of our draft articles activities which cause, or create an appreciable (significant) risk of causing, harm to the environment of the "global commons"? Let us see.

82. First of all, banning the use of certain listed substances above certain levels would not seem to apply, because then there would be nothing to negotiate and we would have a case of responsibility for wrongfulness. If we cannot use that method, the only possible way to apply the logic of our draft articles to activities "with harmful effects" is to transform the levels of prohibition into thresholds above which the mechanisms of our draft will come into play. Levels above the threshold would not be banned, but if it was found that a State had exceeded the threshold, any affected State would be able to request consultations with the alleged State or States of origin, possibly with the participation of an international organization. The purpose of such consultations would not be to agree on a régime applicable to the activity in question, since such a régime would already exist, 90/ but to find ways of enforcing it, either through co-operation or through some kind of collective pressure such as publishing the request for consultations or some other method which does not amount to a penalty. In any event, if the harm caused can be identified and the environment in question can be restored to its status quo ante, this will give rise to a causal liability on the part of the State or States of origin which might be covered by chapter V of our draft, dealing with liability per se.

89/ The Convention on the Regulation of Antarctic Mineral Resource Activities, while it establishes the causal liability of the Operator, and also the liability of the State for that portion of liability not satisfied by the Operator or otherwise, promises a future protocol on liability (article 8, para. 7).

90/ We are assuming that, in the context of a causal liability of the kind envisaged in this draft, a convention or specific protocol would exist that established the levels up to which certain elements can be used in specific activities. If there are certain substances which cannot be used at all, the level would be zero and above it there would be an obligation to consult or possibly to negotiate.

83. What about the affected State? By definition, there is no such State because if there were one within the meaning of article 2 (j), it would be covered by the terms of the present draft articles. The concept of affected State would have to be defined differently, perhaps by drawing on article 5 (2) (f) of part 1 of the draft articles on State responsibility (see para. 79 above) - not reproducing it word for word, but simply saying that any State party to our convention automatically becomes an affected State if transboundary harm affects an expressly protected collective interest of the States parties, as the environment of the "global commons" would be.

84. In order for this reasoning to work, it might be necessary to redefine "harm" since, although responsibility for wrongfulness could conceivably arise without material harm actually occurring, as envisaged in part 1 of the draft articles on State responsibility for internationally wrongful acts, that is not so likely when it comes to causal liability, which primarily relates to results. The problem seems to lie in the fact that the collective interest suffers harm, but this harm cannot as yet be perceived in people. Some way must therefore be found of distinguishing this type of harm from the tangible and visible harm that is covered by responsibility in general. The text should include a separate section on harm to the environment of the global commons, describing these characteristics 91/ and defining the collective interest that is affected, so that harm can automatically be considered to have occurred whenever the quantities above certain stipulated levels are introduced into the environment of the global commons. This would be a somewhat different concept, something like the idea of threat-of-harm. We believe that harm to the environment must somehow be seen in relation to the people and States that are affected, because in the final analysis it, like any other harm, is of concern to the law only to the extent that it affects people (including their property). There is no harm, and hence no measurement of harm, other than that which is caused to human beings, either to their person or to their property, 92/ whether directly or else indirectly through the property of their State. This is clearly the case when the environment of a State is affected, because the State personifies a human society. If the environment affected is that of the global commons, the collective interest of States is affected and, through them, the physical persons who make up their population.

91/ In other words, differentiating it from harm caused to persons or property, or even to the environment of a given country, so that it fits the description given above.

92/ In this regard, the Lake Lanoux judgement seems to state a profound truth when it says that "the unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities" (quoted in A/CN.4/384, para. 156). In the survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law prepared by the Secretariat, the relevant passage of the judgement is interpreted as follows: "Many variables have been taken into account to determine what constitutes harm. Most importantly, it seems that there must be some value deprivation for human beings" (ibid.).

85. More or less the same considerations apply to activities "involving risk", except that here the logic of liability for risk applies naturally, since responsibility for wrongfulness cannot be applied to accidents without creating the problems which, in fact, led to the adoption, in domestic law, of the concept of "strict" liability.

86. For both types of activities, the principles governing harm caused to the global commons would be the same, mutatis mutandis, as those set forth in chapter II of the present draft. One major consideration would, however, have to be borne in mind in applying these principles to developing countries and making provision for their special situation. The developed countries have played a leading role, and the developing countries a far lesser one, in the process which has led to saturation of the atmosphere. Moreover, many developing countries would be totally innocent victims of any consequences of global warming and climatic change, having done little if anything to cause it. Restrictions will therefore have to be imposed mainly on the developed countries, which are the major contributors to the pollution of the environment of the global commons; in cases where limits on production or bans on certain elements inevitably affect the developing countries, the latter will have to be entitled to technical assistance and other types of compensation, while preserving their sovereignty in general and their sovereignty over their natural resources in particular.

87. Of course, the above is only a preliminary analysis of the most important points that will have to be borne in mind in exploring the possibility of extending our topic to the areas under consideration here. Many other changes will have to be made if it is found that this analysis offers at least some basis for pursuing the matter.